Mediacom

Joseph E. Young,
Senior Vice President, General Counsel & Secretary

December 7, 2011

By Federal Express
William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket Nos. 09-182 and 10-71—Comments Regarding November 30, 2011 *Ex Parte* Notice of November 28, 2011 Meeting by Representatives of the National Association of Broadcasters ("NAB") with Media Bureau

Dear Mr. Lake:

NAB's letter summarizing the November 28 meeting with you and others in the Bureau starts positively, extolling the virtues of local stations that supposedly enter into shared services agreements altruistically, for the good of the public, rather than in order to extract more money from advertisers and MVPDs and cut costs by firing people and reducing diversity of voices by combining news operations and homogenizing editorial policies. It quickly turns somber, however, warning the Commission not to be tempted by the sophistry of devious MVPDs who want to continue to wield their vast and unconstrained market power to take advantage of helpless local television stations in retransmission consent negotiations.

The letter brings to mind the dualism of the TV world. It is often a warm and happy place, populated by such lovable characters as a cuddly, nurturing purple dinosaur, a giant, but benevolent yellow bird, and a precious and precocious Hispanic toddler and her booted monkey friend. But there is also a much darker side, filled with serial killers, flesh-eating zombies, and—scariest of all, it appears from NAB's *ex parte* notice—clustered cable MSOs.

Of course, Barney, Big Bird, Dora the Explorer and zombies don't really exist, and if Los Angeles, Miami and New York actually experienced serial murders as often as depicted on television, they long ago would have dropped out of the ranks of our most populous cities.[1] TV shows are works of fiction that seek to gain audience acceptance by relying upon fantasy,

[1] According to one source, murders occur 195 times more often on TV than in reality. http://www.statepress.com/archive/node/457. It has been reported that an average American child will see 200,000 violent acts and 16,000 murders on TV by age 18. Senate Committee on the Judiciary, *Children, Violence, and the Media: A Report for Parents and Policy Makers* (Sep. 14, 1999).

exaggeration, over-dramatization and, most of all, viewers' gullibility or willingness to suspend critical judgment.[2] A similar work of creative fiction that counts on the same audience characteristics is the broadcasters' story about relative leverage in retransmission consent negotiations. The NAB *ex parte* notice is only the latest chapter in that story.

Citing data indicating that concentration in the "MVPD industry" is higher than a decade ago at the national level and also higher at the regional level because of increased "cable system 'clustering,'" NAB claims that "MVPDs have an unfettered incentive and ability to achieve high market shares and exercise virtual gateway control over their distribution platforms." NAB suggests that because MVPDs face "no limitations on either horizontal or vertical ownership,"[3] it would be unfair or contrary to the public interest for the Commission to restrict one station owner from negotiating retransmission consent deals for multiple broadcast television stations in a market.[4]

Assuming that it were true that MVPDs are not subject to any limits imposed by the Commission on "vertical ownership," exactly how that might translate into greater leverage in retransmission consent negotiations is obscure, at best. The absence or presence of vertical limits is simply an irrelevancy in the current debate over the need for retransmission consent reform, including suggested reforms regarding joint negotiations on behalf of multiple stations in a market.

When it comes to horizontal concentration, NAB's letter is just the latest reprise of a favorite tactic of broadcast interests—the effort to divert attention from their own bargaining power in retransmission consent negotiations by representing "cable" as monolithic and monopolistic and pretending that MVPDs are all giants like Comcast or DirecTV. In truth, cable companies long ago lost any vestige of monopoly power that some of them might once have possessed. The cable industry has already seen a huge part of its market share move to DBS and telephone company competitors and the bleeding continues.[5]

Moreover, while a handful of the very largest MVPDs account for a big percentage of all payTV subscribers, it is important to bear in mind that millions of American households receive

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[2] See http://topics.wisegeek.com/topics/hyperbole-meaning.htm# ("Without hyperbole, advertisers, storytellers and publicists would probably be looking for other lines of work.")

[3] The NAB letter fails to mention that both vertical and horizontal acquisitions by MVPDs are subject to the antitrust laws. In addition, those acquisitions often require one kind of consent or another by the Commission, which has not hesitated to impose conditions intended to protect consumers, competitors and other market participants from abuses of resulting accumulations of market power.

[4] NAB has made this claim before. *See, e.g.,* Opposition of the Broadcaster Associations, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* M.B. Docket 10-71 (May 18, 2010).

[5] In November 2010, cable penetration fell to 60.7%, the lowest level in 21 years, while the share of television households of DBS and other "alternate delivery systems" reached a record 30.5%.*Cable Penetration Hits 21-Year Low,* TVNewsCheck (Dec. 16, 2010), available at http://www.tvnewscheck.com/article/2010/12/16/47812/cable-penetration-hits-21year-low.

their multichannel video service from much smaller MSOs or one of the hundreds of small, independently owned cable systems that individually serve only a few hundred or thousand subscribers, primarily in small towns and rural areas. The notion that a typical ACA member serving a few thousand customers in a small town, or even an MSO outside of the top five, has sufficient market power to threaten or dictate terms to ABC/Disney, CBS, FOX, NBC/Universal, Sinclair Broadcast Group or Hearst Television is simply silly.

The reality is that there is no such thing as "cable"—there is only a bunch of separately owned MVPDs (since the two DBS companies should not be ignored). The argument that because the top four MVPDs' share of the national multichannel video market for the whole, entire country is large and has actually increased since 2002,[6] local broadcast stations have lost leverage in retransmission consent negotiations generally is contrary to logic and common sense. The top four MVPDs do not negotiate retransmission consent deals jointly with each other or with any of the hundreds of other cable companies that account for the 30% of the market not controlled by the top four. Not surprisingly, in Mediacom's negotiations with station owners, the fact that the national market shares of the four top MVPDs, whether individually or in the aggregate, are large and have increased since 2002 does not help Mediacom (or any other cable company not in the top four) secure better terms in retransmission consent negotiations.

Negotiations are conducted by a single MVPD and a single owner of broadcast stations. In terms of national market share, sometimes the MVPD is really big, such as Comcast or DirecTV, really small, such as the average ACA member, or somewhere in between. Similarly, sometimes the station group owner is very large in terms of national market share, as is the case, (for example, for Sinclair and the networks' O&O stations), sometimes it is very small, such as an independent station outside one of the top 100 DMAs, and sometimes it is somewhere in between.

What is most relevant in measuring the bargaining power of an MVPD in negotiations with a local broadcaster or the owner of multiple local stations is not its national or regional market share, considered in a vacuum. Instead, what matters is the MVPD's share of the markets that both the MVPD and the broadcaster serve, since that defines the amount of damage that the MVPD can do to the broadcaster. Although Comcast has been described as a behemoth that would "emasculate a broadcaster by dropping its stations,"[7] it is conceivable that even Comcast would not have much leverage when negotiating for retransmission consent with a broadcaster that owns only one or a few stations. For example, if there are two million MVPD subscribers in a DMA served by a station that is the only station of its owner and Comcast's systems in the DMA aggregate 10,000 subscribers, Comcast has little or no leverage because if the station is not carried by Comcast's systems, the number of its subscribers is insufficient to cause the station's advertising rates to decline or to cause advertisers to cancel or forego ad buys. A shut-off by the station, however,

[6] Of course, the primary reasons for the growth in the market share of the top four MVPDS are acquisitions by Comcast and Time Warner Cable of other MSOs, most notably Comcast's acquisition of the AT&T Broadband systems, and growth by the two DBS companies, largely at the expense of cable companies other than the top two. Cable's overall share of the national market has been declining for a long time.

[7] Linda Moss & Mike Farrell, *Dueling for Dollars*, Multichannel News (Mar. 5, 2007) (*"Dueling for Dollars"*), available at http://www.multichannel.com/index.asp?layout+articlePrint&articleID=CA6421302.html.

could cost Comcast thousands of dollars in value for each subscriber that switched to a competitive MVPD.[8]

As an example, in Mediacom's two public retransmission consent disputes with Sinclair, bargaining power was severely skewed because Mediacom's systems' represent less than 3 percent of Sinclair-managed stations' aggregate audience, while approximately 50 percent of Mediacom's systems are located in DMAs served by at least one Sinclair-managed station. In many DMAs, Mediacom's share of the total television households was so small that there would be no impact whatsoever on Sinclair's advertising rates or revenues from a shut-off. Equally significantly, Sinclair controls the exercise of retransmission consent rights of more than one station in several of the DMAs, compounding the impact upon subscribers of a shut-off. As Sinclair crowed to stock market analysts and investors during the first dispute, loss of carriage of Sinclair on Mediacom's systems would have negligible impact on Sinclair, but a huge impact on Mediacom.

In the case of the average ACA member with a few thousand subscribers, the situation faced is <u>always</u> the one Mediacom experienced with Sinclair. The average member is so small relative to the size of just about any DMA in the country that there is no set of circumstances under which it will have any negotiating leverage with any broadcaster in any market and that dismal reality is not changed a bit by the irrelevant fact harped upon by broadcasters that the top four MVPDs have a big national market share, both individually and in the aggregate.

The same analysis applies with regard to clustering. If the biggest MSOs pursue a clustering strategy in the biggest metropolitan markets, that fact does not affect one iota the negotiating power of any other MVPD—or even the leverage of any one those top MSOs in negotiations involving stations outside of the DMAs where it has its biggest clusters.

The Commission, of course, is well aware that national or regional market share, whether achieved through growth, acquisitions, clustering or otherwise, does not necessarily equate to market power. As the United States Court of Appeals for the District of Columbia Circuit remarked in its 2001 decision setting aside the Commission's limit on cable ownership, "normally a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition."[9] In a Further Notice of Proposed Rulemaking issued in response to that decision, the Commission noted that the court faulted the Commission for "mistakenly equating market share

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[8] In addition, Comcast's leverage might be matched in a battle with one of the Big Four networks, since their owned and operated stations may be concentrated in the large metropolitan markets served by Comcast. *See Dueling for Dollars*, *supra* note 7 (quoting Sanford C. Bernstein cable analyst as writing that "[i]f Comcast were to fail to reach a settlement with CBS and 'go dark' . . . considerable pain could be inflicted on and by both" since "55% of Comcast's total footprint would be exposed to having its subscribers switch" while "56% of CBS's total advertising revenue would potentially be vaporized").

[9] *Time Warner Entertainment Co. v FCC*, 240 F.3d 1126, 1134 (D.C. Cir. 2001).

with market power," and it recognized that a cable company's market power may be limited by the existence of competitive MVPD services, even if cable has the largest market share.[10]

Although broadcast interests claim otherwise, relative leverage in retransmission consent negotiations is not a function of national market shares of MVPDs or station owners, clustering, HHI numbers, ratings numbers or relative percentages of off-air and payTV households. Instead, leverage in retransmission consent negotiations is entirely a function of the relative amounts of damage that the parties can inflict upon each other if there is an interruption of service,[11] and "market share" makes an asymmetrical contribution to the calculus. The amount of damage that a broadcaster can do to an MVPD depends on the number of the MVPD's subscribers who will switch to an alternative provider if there is an actual or threatened interruption of the MVPD's carriage of the affected broadcast stations. That, in turn, depends first and foremost upon the degree of viewer loyalty engendered by programs carried by those stations—if a significant number of subscribers are so loyal to a program that they will switch MVPDs rather than forego viewing for an extended period, then denial of consent for continued carriage may impose a considerable economic penalty upon the MVPD. That, of course, is why broadcasters time shutoffs to coincide with major television events like college or professional football playoffs, American Idol finals or the Oscar awards.

In adopting the retransmission consent requirement, Congress thought that service interruptions would be infrequent and short-lived because each side to a dispute had much to lose during a disruption. The Commission subsequently endorsed that view, saying that the retransmission consent process provides "incentives for both parties to come to mutually beneficial arrangements."[12] A CBS executive once summed up this concept by saying that a central feature of retransmission consent negotiations was a "balance of terror" because each party could inflict severe damage upon the other if a deal was not reached.[13]

That theory should be relegated to the trash bin because the growth of DBS and other competitive alternatives to cable television has altered the balance of power that Congress thought would protect consumers. Shutting off a signal is a tactic that works for station group owners because the MVPD faces competition. It does not work for MVPDs for a few reasons. Many of

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[10] Further Notice of Proposed Rulemaking, *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 01-263, CC Docket No. 98-82 (Oct. 12, 2001).

[11] *See Dueling for Dollars*, *supra* note 7 (quoting Sanford C. Bernstein cable analyst as saying in an interview that "[a]t the end of the day, these negotiations are about who can cause whom the most pain").

[12] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, ¶ 44 (Sept. 8, 2005).

[13] In prepared testimony before a House subcommittee in 2004, an executive of CBS said that "there is a 'balance of terror' between broadcasters and MVPDs that has ensured that public spats over retransmission consent (such as the Disney/Time Warner and Fox/Cox disputes) are few and brief." *Oversight of the Satellite Home Viewer Improvement Act,* House Subcommittee on Telecommunications and the Internet, March 10, 2004 (testimony of Martin D, Franks, Executive Vice President, CBS Television), available at http://energycommerce.house.gov/108/Hearings/03102004hearing1227/Franks1883.htm

those reasons trace to the fact that the only downside of significance to a broadcast station from a shut-off is the potential loss of revenues because advertisers place fewer ads or force a reduction in advertising rates because of lower ratings for the station's programs. The impact on ratings is lessened to the extent that the MVPD's subscribers have viewing options, such as receiving the station's signal off-air, switching to a competitive MVPD or watching favorite network shows on the Internet. Of course, the station also collects retransmission consent fees from competitive MVPDs for those subscribers who do switch.

Moreover, broadcasters are insulated from competition by contractual exclusivity rights given the force of law by the Commission's network non-duplication and syndicated exclusivity rules, and a station that is not carried by an MVPD because of a negotiating deadlock does not have to fear a permanent loss of viewers to an out-of-market station with the same network affiliation temporarily substituted by an MVPD. That means that if the shut-off eventually forces the MVPD to accede to the station's asking price, the subscribers who did not switch and who could not receive the signal over the air will immediately resume their places in the station's viewer base for purposes of setting advertising rates. The MVPD, however, may never recover the subscribers who switched to an alternative provider.[14] The broadcaster, in essence, is a local monopolist unconstrained by fear that a local distributor will find an alternative source of supply.

Again, consider the hundreds of ACA members, who average a few thousand subscribers. It is absurd to suggest that a cable operator with so few subscribers in a DMA with millions of television households has any leverage in dealing with the broadcasters in that market. If that operator does not carry a signal, the station will hardly notice. Its ratings and advertising rates will not be affected one iota. The cable operator, on the hand, will suffer significant economic loss if as little as one or two percent of its subscribers switch to DBS or another competitor because their favorite network shows are not available on the system. The playing field is seriously tilted and there are no "incentives" for the broadcaster "to come to mutually beneficial arrangements." Indeed, there is no incentive for the broadcaster to negotiate at all. That is why many ACA members report that some large station group owners present them with a set price, fixed contract terms and a threat that unless accepted, the terms will become even worse.

When it comes to negotiations between a company that represents multiple broadcast stations and any MVPD other than the top few, the reality is that the so-called "balance of terror" is usually one-sided. As one industry publication said, ""[i]n today's competitive video environment—where cable operations face off not only with their satellite rivals, but telcos such as Verizon Communications and AT&T—the market has reached a tipping point, where small operators have virtually no leverage against big broadcast groups."[15] The Commission itself has recognized the imbalance of power in retransmission consent negotiations between media conglomerates and small

[14] DBS providers typically require new customers to lock into contracts of at least one-year's duration. So even if cable subscribers who switch do not develop a permanent allegiance to the new provider, an immediate return to the cable system is not possible without incurring a hefty early termination fee.

[15] *Dueling for Dollars*, *supra* note 7.

and medium-sized cable companies.[16] The Commission has further noted that these small and medium-sized companies often lack the resources to finance retransmission consent disputes.[17]

Given the indisputable fact that bargaining power is a function of the ability to inflict damage, the leverage that a shut-off or threatened shut-off gives a station is greatly increased in DMAs where, because of evasion or lax enforcement of the duopoly rules or gaps in those rules, the broadcaster can deny permission to carry multiple stations that it controls in a single market. Common sense informs us that if a broadcaster can blackout two or three of the Big Four stations in a market instead of just one, the negative impact on the MVPD will be compounded. Besides what our brains tell us, there also is empirical evidence that broadcasters gain when negotiations are conducted jointly on behalf of multiple Big Four affiliated stations in a market—for example, an economic analysis submitted by ACA cites a study prepared by Suddenlink that found a bump of more than 20 percent in the average retransmission consent fees paid for Big 4 stations where a single entity controls negotiations for more than one such station in a market.[18]

We respectfully submit that the Commission should stay grounded in the real world, rather than the fictional world of broadcast television interests, and heed the call by Time Warner Cable, Dish Network, the ACA and others to promptly address the issue of joint negotiations on behalf of multiple stations, regardless of whether the joint representation is based on common ownership, shared service agreements, use of a common negotiating representative or some other relationship or circumstances.

Thank you for your consideration.

Very truly yours,

Joseph E. Young

cc: Marlene H. Dortch (by electronic filing in MB Dockets 09-182 & 10-71)

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[16] *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004), at ¶ 176 ("…small and medium-sized MVPDs may be at particular risk of temporary foreclosure strategies aimed at securing supra-competitive programming rate increases for 'must have' programming….").

[17] *Id.* at ¶¶ 176, 224.

[18] *See* ACA Comments at 9-14 and Appendix B, MB Docket 10-71 (filed May 18, 2010) (discussing findings of study by William P. Rogerson entitled "Joint Control or Ownership of Multiple Big 5 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees"). *See also* Suddenlink Communications, "Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant,* CSR No. 8233-C, 8234-M at 5 (filed Dec. 14, 2009).